THE Jurisdiction *of the* Chancery AS A COURT *of* EQUITY RESEARCHED.

And the Traditional Obscurity of its Commencement *Cleared.*

WITH

A Short Essay on the Judicature of the Lords in Parliament, upon Appeals from Courts of Equity.

The *Third Edition*, to which is added a Table shewing those Negative Statutes which contain in them *Prohibitions* Commanding as well Superior, as the Inferior Courts of Judicature to *Desist*, and *not to hold Pleas* upon Writs of Subpœna, in Matters of *Freehold* and *Inheritance* that are *Determinable* by the Common Law; *which Prohibitions* are grounded upon the Rule of *Contrarys*; for if Writs of Subpœna, do Grieve the People and *Subvert* the Common Law, which commands Common Right to be done to all, without Respect of Persons, *then* the Negative Statutes referred to, which command Common Right to be done to all, and the Common Law to be duly observed, Do, by a necessary Implication, contain a *Prohibition* to their *opposites*, viz. Writs of Subpœna, which *Subvert* the Common Law, and import Injustice and Oppression.

LONDON:

Printed for *Joel Stephens*, at the *Hand* and *Star* between the *Temple Gates*, 1736.

(Price 1 s)

THE

Publication of the Chancery

AS A

COURT of EQUITY

SCANDALOUS,

And the Tendency of its Com-
mencement Vexatious.

WITH

Some Thoughts on the Jurisdiction of the Courts in
Parliament upon Appeals from Courts of Equity.

LONDON:

Printed for Paul Stephens, at the Head and Star
between the Temple Gates, 1750.

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THE
Juriſdiction *of the* Chancery
AS A
Court of *Equity*, &c.

IT hath been a received opinion of Learned Men, that thoſe important Branches of the Common Law, touching the form and qualities of Eſtates and Intereſts in Lands, *viz.* Deſcents of Inheritances, Tenants by the Curteſy, Tenants in Dower, *&c.* and the ſeveral powers of the Tenants thereof, in and over ſuch their own Eſtates and Poſſeſſions, and the Cuſtoms of Gavelkind, and the incapacities of Infants till their Ages of 21, the incapacities of Femes Covert and other general Cuſtoms and Uſages in *England*, and alſo the Maxims and known Rules of Law, were firſt *formed* and had their firſt Riſe and Commencement, by and from Acts of Parliament; altho' the Records of thoſe Statutes are not now to be found: For all Laws muſt in their Creation have *Forms* given them; becauſe *Forms* are the only Indexes by which one Creature can be diſtinguiſhed and known from another.

It

It is well known that in the *Original Formation* of our Engliſh Conſtitution, care was taken to plant, and fix the *Root*, and to ſperify the principal Branches of the Law, and to reduce the ſame into the *Form* of a Statute called Magna Charta: In which the Wiſdom of our Anceſtors appears, in chooſing the moſt comprehenſive *Negative Words*, that could be invented, to exclude Injuries and Injuſtice, to the end a *Diſpenſing Power*, and all Partiality, to favour one Man againſt another, might be taken away: And that *Every* Man, without exception, ſhall have equal right to *Claim*, and to expect *to have*, the benefit of that Fundamental Law.

Thoſe *Negative* Words are exquiſitely expreſſive and are theſe.

Nullus Liber Homo Capiatur, vel Impriſonetur, aut Diſſeiſietur de Libero Tenemento ſuo, vel Libertatibus vel Liberis Conſuetudinibus ſuis, aut Exuletur aut aliquo modo Deſtruatur; Niſi per Legale Iudicium Parium ſuorum, vel per Legem Terre: Nulli Uendemus, Nulli Negabimus, aut Differemus, Inſticiam vel Rectum.

In Engliſh thus.

No Freeman ſhall be Arreſted, or *Impriſoned or Diſpoſſeſſed* of his Freehold (meaning his Property in Lands or Goods,) or of his

his Liberties or Free Cuſtoms, nor ſhall be Baniſhed, or in any manner Deſtroyed: But by the Judgment or Verdict of his Peers (meaning by a *Jury of his Equals,*) *or by the Law of the Land*; We will *Sell* to no Man, we will *Deny* to no Man, we will *Delay* to no Man, Juſtice or Right.

The Words of this Law are ſo Extenſive, that no Man (without his own fault) can be excepted or excluded or barred from the Benefit of them, or in other Words, no Freeman ſhall be *Prohibited*, to purſue his *Remedy* at Common Law, to *recover* his Right; neither ſhall his Right or Means to *defend* it, be taken from him: But then thoſe Words muſt be expounded in an Affirmative Senſe, *viz.* That every Man ſhall have the *Liberty* of his Perſon, and a *Property* in his Poſſeſſions, and ſhall not be *Diſpoſſeſſed*, either of his Poſſeſſion or Liberty, or of his free Cuſtoms, meaning of his Freedom in Trade, or his *Profeſſion* in any Science, or of his *Remedy* to recover, or defend thoſe Rights and Privileges, but by due Courſe of Law.

And moreover in and by the Words of Magna Charta, (*Liberties and free Cuſtoms*) are comprehended, all the Maxims and Rules of the Common Law, by which Mens Rights and Properties, and Liberties of his Perſon and Freedom of Trade are to be meaſured defended and determined. This

This *Magna Charta* or General Law, being the Hereditary Brith-right of every Man. It becomes Neceſſary, to take notice of the *Judicatures* erected for the Adminiſtration of Juſtice, that were inſtituted, and to be guided by this Standard.

For this Purpoſe, it is well known, that by the Original Conſtitution, the *King in his own Perſon* was, (for many Subſtantiall reaſons) *excluded* from the Adminiſtration of Juſtice, and that the *Judicature* of all Controverſies according to the poſitive Laws, was diſtributed and divided, amongſt the 12 Judges, who repreſent the King and are of his Nomination, in the ſeveral Courts of Law in Weſtminſter-Hall; and whoſe *Judicial Authority*, (after their nomination,) is derived, not from the King, but from the *Conſtitution*.

But the points of Magna Charta, being expreſſed in General Terms: Many Caſes happened, by reaſon of *Fraud and Breach of Truſt*; which occaſioned great Grievances, and numerous Complaints, againſt which, *Magna Charta* and the Common Law, had provided no Remedies, nor had Erected any *Judicatures*, in which, thoſe Complaints might be heard, debated and determined.

In

In this uncertainty, many were the complaints of the People, and many were their *Illegall* Addreſſes, and Applications made, ſometimes to the ordinary Courts of Juſtice, and ſometimes to the King himſelf, to obtain what, *they call'd Juſtice.* In which proceedings, many were the *Illegall* Stretches, and Deviations, that were made, from *Magna Charta* and the known Rules of Property; Inſomuch, that *Magna Charta* was, ſometimes denied to have the force of a Law, or Statute, or however, that it did not bind or exclude the King from Judicature.

And the Arguments which have been made uſe of to prove that Magna Charta did not bind or exclude the King from Judicature were that altho' the Words of Magna Charta are *Violent Negatives*, yet thoſe Words were *Diſjunctive*, that is, no Man ſhall be Impriſoned or Diſpoſſeſſed, &c. *but by the Judgment*, (meaning the Verdict) *of a Jury of his Equals, or by the Law of the Land*; and from that *Disjunctive*, they have Argued, that, the King had Prerogatives or Authorities in Judicature, that were ancient and prior in time, or at leaſt Coeval, with Magna Charta.

And that therefore thoſe Prerogatives or Authorities, were that *Legem Terre*, or that Law of the Land, *which* Magna Charta mean

meant by thoſe *Disjunctive* Words, and ſo left them Unreſtrained.

To this Specious Argument, this ſhort Anſwer may ſuffice, that there is not nor never was extant in *England*, any Law but what was and is either a Statute Law, or the Common Law; *neither of which* ever inveſted the King with any Authority in Judicature, to draw in queſtion, examine, or determine, any Man's Right in his Freehold or Property, or to make his *Will* the Law; but this ſhorter Anſwer ought to put an end to the Queſtion, *viz.* That every Word of Magna Charta, is by the Statute of the 25 *E.* 1. *cap.* 1. Declared, to be the Common Law of the Land; which hath reſtrained all Rights and Queſtions of Freehold and property, to be Tryed by *Juries only*.

And therefore the People being grieved with theſe *Wild Conſtructions*, and with multitudes of *Illegal* Petitions and Suits made to the King himſelf; In which partiality and malice, and potent Favourites often prevailed: They (the People) by their Repreſentatives in Parliament Claimed, and Conteſted for, and obtained the ſeveral material *Explanations of Magna Charta*, to be made, as follows, *viz.*

By

By the Statute of the 52. *H.* 3. *cap* 5. *Anno Dni.* 1268. call'd the Statute of *Marlebridge*, This Declaration and Expoſition was made, that *Magna Charta* ought, in every Article, as well in thoſe, *which concerned the King*, as in thoſe which *concerned the People*, to be holden and obſerved: The meaning whereof was, that, the Crown never had any *Authority* to act in the Adminiſtration of Juſtice, contrary to any point of Magna Charta; and this Statute therefore, If it meant any thing, did mean, that Magna Charta did diſable and exclude the Crown from doing any Act, to hurt or deprive the Subjects of any Rights, Liberties, or free Cuſtoms, or Trade, ſecured to them by Magna Charta.

By the Statute of the 25 *E.* 1. *cap.* 1. 2. *Anno Dni.* 1297. Theſe expoſitions were made and declared, that Magna Charta was eſtabliſhed by the *common Aſſent of all* the Realm, and ought to be holden in all points, without Diſdain, and that every point of it was *the Common Law* of *England*, which ought to guide all Courts of Juſtice; and that all Judgments given, by any Judges or by any of the King's Miniſters, who ſhall hold Plea contrary to any point of Magna Charta, ſhall be holden for *nothing*: By which 2 Statutes, it was Declared that the Words *per Legem Terre*, or the Law of the Land being one of the points of Magna Charta, did mean

the *Common Law*, excluſive of all *Authorities* of the Crown.

But notwithſtanding *Magna Charta* was the *Root*, and theſe explanations were the *Branches*, or Forms to Point out and Manifeſt the Common Right of every Man: Yet many Grievances aroſe by reaſon, that ſuch People as had Potent Friends at Court, declined the ordinary Courſe of the *Common Law*, and troubled the King in Perſon, with *Illegall* Petitions, containing falſe Suggeſtions, to injure and *Illegaly* damnify the Lower Subjects, *contrary* to Magna Charta (meaning contrary to the Forms of the Common Law,) and upon thoſe ſuggeſtions, the King did ſometimes at the importunity of powerful Perſons at Court, cauſe *Illegall Commands* to be ſent under the Great Seal, to *delay common Right*, And therefore to Redreſs this grievance: Another explanation was made, by the Statute of 2 *E.* 3. Whereby it was Enacted, that Magna Charta ſhould be obſerved in all points; and that it ſhould not be commanded by the Great Seal, to diſturb or *delay* common Right, meaning Proceedings at *common Law* to obtain Right, which in fact was no more, than a *Repetition* of the Statute of 25*th E.* 1. *cap.* 2.

But ſtill the King was troubled, and the People vexed, with *Illegall* and falſe Suggeſtions

geſtions ; And therefore, to *extirpate* and extinguiſh this Grievance, and to remove it, as well from the Kings Perſon, as from the People : The Commons *deviſed* the Statute of 37 *E.* 3. *cap.* 18. which the Lords paſſed and the King Aſſented to, in the Year 1363, (being now near 400 Years ago.) By which Statute, *Magna Charta* and conſequently all the maxims and eſtabliſhed Rules of the Common Law which had their Commencement by Acts of Parliament, were again confirmed, and thoſe informal Proceedings were declared to be *Illegal.* And the recital of the Grievances was That altho' it be contained in the *Great Charter*, (which in the ſame Statute was then confirmed,) That no Man ſhould be *Taken, or Impriſoned, put out of his Freehold*, without proceſs of Law: *Nevertheleſs* divers People did, out of Malice, make falſe ſuggeſtions to the King himſelf, which occaſioned the *firſt Grievance, viz.* That the King himſelf was thereby often *Grieved*, (that is, he was (as may be ſuppoſed) *Illegally* troubled, with Difficulties to find out and diſtinguiſh, which Petitions were contrary to *Magna Charta*, and which not,) *And the ſecond Grievance* was, that divers were *Damnified*, againſt the form of the ſame Charter, (*i. e. Illegally* Damnifi'd.) And therefore the *Remedy*, againſt theſe two ſorts of Grievances and *Illegall* proceedings, which the Sta-

tute provided, was, that they who made ſuch ſuggeſtions, *ſhould be ſent with their ſuggeſtions, before the Chancellor*, and there find ſurety to purſue ſuch their Suggeſtions: And that they ſhould incurr the ſame Pain, in caſe their *ſuggeſtions* ſhould be found *EVIL*, (to be ordered doubtleſs by the Chancellor,) as the other ſhould have had, if he were Attainted: And that then Proceſs of Law ſhould be made againſt them, (meaning the Defendants) *without b ing taken, or Impriſoned*, againſt the *Form* of the ſame *Charter* and other Statutes. The Words (*found EVIL*) are afterwards by the Statute of 15. *H.* 6. *cap.* 4. expounded to Man, that if the matter complained of, be de terminable at common Law, it is *EVIL.* *

This Parliamentary Tranſferring of theſe *Illegall Suggeſtions*, from the Kings Perſon, to the Chancellor, and Impowering him to examine, *hear and Determine* the Matter, and to make Orders therein, doth warrant theſe Concluſions, *viz.*

1. That by force and vertue of this Statute, the *Juridiction*, Power and Authority of the

(*) The *Chancellor* Named in this Statute is indifferently Applicable to all the King's Chancellors, *viz.* The Lord Chancellor of *England*, the Chancellor of the Court of the Exchequer, the Chancellor of the Duchy of *Lancaſter*, &c.

the *Chancery*, as a Court of Equity, had its *Firſt and Original Juſtitution and Commencement:* And that all the Judicial power of the Chancellor, as a Judge of Equity, is *Derived* from this Act of Parliament.

2. That the recitalls in this Statute do *bind down all Men from Liberty to affirm*, that this Juriſdiction was, before this Statute, any part *of the Law of the Land*; Or that it was not firſt introduced, as a new Law, by this Statute; Or to ſay, that before this Statute, *Petitions or Suggeſtions* made to the King, touching the matters aforeſaid, were *Legal, or Juſtifiable*; for ſuch an Allegation would contradict the Statute it ſelf, and the *Authority* that made it, with ſuch *TRADITIONS*, as have no Certainty or real Exiſtence in them but are Chimerical and variable with every Man's Conceit and Imagination, for an Act of Parliament ought to be conſidered as a national Contract and Agreement, to be the Rule of Juſtice and Right between all Men; for a Statute is the Will of the Legiſlature ſignified in written Words, To the obſervance whereof every Man is a party conſenting and therefore Bound.

But becauſe the *Chancellor*, being inveſted with ſuch a vaſt Power, might imagine his *Authority* to be unlimited; and above the

Law

Law: *Care* was taken, even in the ſame Parliament, to compaſs in his Juriſdiction and Authority, with *Bounds*, and particularly with the *Indelible Memento*, of the Negative Words in *Magna Charta*, *viz.* That no part of the Common Law ſhould be *Offended*, nor any Man *Diſarmed* of his Legall Right, or of his remedy to recover that Right or of any Legal means to *defend* that Right, or that ſhould look like a *Diſpenſing Power*, to unmake, or overturn, any point of *Magna Charta*, or to change any maxim or eſtabliſhed Rule of the Common Law, (except it ſhould be upon ſome ſubſtantial ground of Equity,) and therefore *Magna Charta*, or the Common Law, was in the very ſame Parliament appointed to be a *Boundary and a guide*, to this unlimited Power, in like manner as Shores Bound the Ocean, or Banks a River: And for that end *Magna Charta* was confirmed after this time, above twenty times, and particularly, by the Statute of the 42 *d. E.* 3. *cap.* 1. (being but 5 Years after this Statute of 37. *E.* 3.) *Magna Charta* was confirmed in an extraordinary manner; for it was thereby further, *&* *de novo* Enacted, that if any Statute be made to the contrary; it ſhould be *holden for None*, (meaning that all Statutes ſhould be expounded to include in them an *implyed Exception* or Proviſion, that no *point of Magna Charta* ſhould be, by any of them offended, changed, or diſannulled.)

But

But the Penalty impoſed by this Statute of 37 *E.* 3. *viz.* That the Complainer ſhould incurr the ſame Penalty, as the other ſhould have had, if he were Attainted, being a *Talion Law*, and obſcure, and Impracticable: *Another Statute* was, in the very next Year, *viz.* 38 *E.* 3, made, whereby Magna Charta was again confirmed, and the Statute of 37 *E.* 3. *explained*, and the Puniſhment altered, and a new Penalty appointed, *viz.* That the *Chancellor* ſhould order the Complainer, who *fails to prove* his Suggeſtions, to be committed to *Priſon*, till he make Satisfaction to the party Grieved, for the Slander, and *for his Damages*: But this Puniſhment trenched too near upon Magna Charta, and was found unfit to be executed, becauſe it made the Chancellor *abſolute Maſter*, of the Liberty of the Perſon whoſe Complaint he ſhould ſay was found *Untrue*. And therefore,

By the Statute of 17 *R.* 2. *cap.* 6. *Anno Dni.* 1393. (being at 30 Years diſtance) the *Power* of Impriſonment was waved or ſuſpended, and a *new Power* was given, to the Chancellor, *viz.* That he, after ſuch Suggeſtions ſhall be duly *found and proved to be UNTRUE*, ſhall and may order *Damages*, according to his *Diſcretion*, to him who is ſo troubled *Unduly*, (which Damages have been expounded to mean Coſts of Suit.) And therefore

therefore from this Statute it may be inferr'd that if the Suggeſtions of the Complainant be found to be *TRUE*, and yet the party complaining be ordered, by *Diſcretion*, to pay Damages, (*i. e.* Coſts,) then ſuch an order, and this Statute, are inconſiſtent and ſtand in Terms of Oppoſition.

And now from theſe 3 Parliamentary Structures or *Inſtitutions*, it may be aſſerted and concluded, that the *Root* and original *Authority* of the Chancery, as a Court of Equity, is not Occult, nor like the Head of the Nile, undiſcoverable, nor is founded on, any ancient Preſcription, time out of mind uſed, nor upon any unwritten Law or Cuſtom: But we may look upon its *Authority* and Juriſdiction, to be firſt Erected and eſtabliſhed, by theſe 3 written Acts of Parliament, made for the Cauſes aforeſaid; out of which *Magna Charta* is intirely *exempted*: And that that Inſtitution is equal to the Inſtitution of any Court of Law whatſoever, (except only, that it is not made a Court of Record, to bind Lands.) And particularly the Statute therefore of the 37 *E.* 3. *cap.* 18. may be accounted the *Charta Minor*, of this Court of Equity, as having made the *Juridiction perſonal only*; and that the Memento of Magna Charta's negative Words, as the *Root*, and all its explanations as *Branches*, in relation to Judgment at Common Law, which bind property

ty and Freehold, were appointed to compaſs in, this new Juriſdiction, as an Inſeparable Monitor, or Attendant, to put in mind: That *no Diſpenſing Power* to change, or to make any Order, to unmake or to change, or controul, any point of Magna Charta, or any Maxim or Eſtabliſhed Rule of the *Common Law*; ought to be aſſumed or exerciſed; for Magna Charta, and its *Branches*, are reſerved and exempted as the *Noli me tangere:* And conſequently it may be aſſerted, that there never was, nor now is, any Power reſiding in any Perſon whatſoever, *to hear or determine*, any Cauſe, touching Lands, or to *Condemn or Commit* any Subject *to Priſon*, otherwiſe than according to *Magna Charta*, and the Statutes aforeſaid. And therefore that Aſſertion brings in Queſtion, the *Authority* of the Orders, made by the Lord *Chancellor Clarendon*, and the Maſter of the Rolls, (Sir *Harbottle Grimſton*,) touching Councellors and *Commitments*: Becauſe they ſeem to be Legiſlative, and to exceed the Bounds, in which the Power of this Court, is to be compaſſed in: For as to the Statute of 2 *E.* 3. the Learned *Judge Fitzherbert* was of Opinion, that thoſe *Commands*, under the Great Seal, to delay common Right, contrary to Magna Charta, were (without that Statute) void, and ought to have been holden for *Nothing*, according to the Explanation before made, by the Statute of 25 *E.* 1. *cap.* 2. *Fitz. N. B.* 240.

This new Juriſdiction or Court of Equity, being thus inſtituted and bounded, it is plain, that all *neceſſary Incidents* were by thoſe Statutes, together with the Juriſdiction it ſelf, tacitely *Given and Granted*, to enable the Court to execute its Power (except incidents contrary to Magna Charta) for the Statute of 37 *E* 3, *cap.* 18. expreſsly Directs, that upon the Lodging the Suggeſtion (or Bill of Complaint) before the Chancellor and ſurety found to purſue it, *Proceſs of Law*, ſhould be made againſt the Defendants, without being *Taken, or Impriſoned*, againſt the Form of the great Charter: And therefore this Statute is the true foundation of the *Authority*, which impowered the Chancellor to frame and iſſue out the new Writ called a Subpena *De quibuſdam Certis de Cauſis*, commanding the Defendants (without Arreſting them) to appear and anſwer the ſuggeſtions of the Petitions (now called Bills in Chancery) and alſo *proceſs of Contempt*, for not obeying thoſe Commands: And alſo proceſs of Contempt, for diſobedience to the final Orders and Determinations made, by that Court, purſuant to thoſe Statutes: *Without*, which Authority, the whole Juriſdiction would be Eluded, and rendred uſeleſs; and upon this Inſtitution, the *Oath* of the Chancellor was new framed, viz. *That he ſhould do Right to all manner of People, Poor and Rich, after the Laws and Uſages of this*

this Realm: For the Words: (*All manner of People*) can refer only to this new erected Court of Equity, which brings before him, *all manner of People*, and this Oath may be thus illuſtrated, *viz.* the Chancellor repreſents the King, that is perſonates the King' in his Chancery, and therefore he, as ſuch Repreſentative, doth by taking this Oath, accept or take into his Care the Laws of *England*, to keep and obſerve the ſame, on the King's behalf and to perform his Majeſties Oath to his People, that is not to deny or delay Juſtice or Right of property, and therefore in caſe the Chancellor ſhould break ſuch his Oath, that Breach is ſo henious, that the Law accounts the offence equal to his wilful breaking, (as much as in him lyes) the Kings Oath. This Oath therefore makes it neceſſary, that ſuch a Judge of Equity ſhould be well acquainted with thoſe Laws and Boundaries, and eſpecially with the Rules of Property, or elſe how ſhall it be known, if he deviates, whether he deviates inadvertently, or preſumptiouſly.

From this Statute it may be inferred, that People before the making thereof, were ſometimes *Illegally Arreſted and Impriſoned*, and compelled to appear to, and anſwer Petitions made to the King himſelf; becauſe this Statute appointed *Proceſs of Law*, to be made *without being Arreſted or Impriſoned*, which

Proceſs muſt neceſſarily be the ſaid Writ of *Subpena*, that was by Authority of this Statute framed, and may therefore be called a *Legal Proceſs*.

And here Notice may be taken of *Injunctions*, as neceſſary Concomitants to this Judicature, and of the nature of them, and when they ought to be *Temporary*, in order to bring the cauſe in Equity, into a proper Way, to be determined: And whether ever they ought to be, and in what Caſes, *Perpetual*. But the Learning of that matter would carry this Speculation further than was intended, altho' it will come hereafter, properly to be touched upon, as a Problem of Power, *viz.* Whether a Court of Equity, which the CommonLaw hath compaſsed in, with Bounds, may aſſume a Juriſdiction *or Diſpenſing Power* to paſs over thoſe bounds, and *bind its Binder*: And ſay to *the Common Law*, by an Injunction or Prohibition, hitherto ſhall thy Courſe proceed, but no futheror that ſuch a determinate *number of Trials* of Right to a Freehold, ſhall be had and no more. But this difficulty calls for further Aſſiſtance, and for that reaſon is at preſent Poſtponed, ſave only, that it is obſervable, that there is no ſubſtantial Difference between an *Injunction* in Chancery and a *Prohibition* at common Law, in Regard the *Commanding* Words in both, are of the ſame Tenor: For the Words of

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an *Injunction* in Chancery, are, we *Command* and firmly injoin you, that you *Deſiſt* from all further Proſecution at Common Law, *&c.* And the Words of a *Prohibition, at Common Law*, are, we *prohibit* and firmly Injoin you; that you ſhall not proceed further in the Spiritual Court, or in the Court of Admiralty, *&c.* So that *both Commands* in the Injunction, and in the Prohibition, Sound, in ſtopping the Proceedings and taking away the *Remedy*, in the reſpective Courts of Common Law: And in the Eccleſiaſtical Court, and in the Admiralty, *&c.* and are therefore *Both of the ſame Import.*

The next thing that comes under conſideration, is, the manner and method of *Trials or Examens*, uſed in this High Court of Equity, to Try the *Truth* or Falſhood of thoſe Suggeſtions, which were directed to be be ſent from before the King to the Chancellor, (now called Bills in Chancery) which method of *Trials* or *Examens* muſt be admitted to be very different from *Magna Charta*: For the *Examen* or Trials inſtituted by Magna Charta are to be made by a Jury of 12 Men upon their Oaths, and by Witneſſes Examined before the Jury, as Judges, *publickly*, Face to face, in open Court, in the preſence of both parties intereſted: Where falſe Witneſſes being confronted and croſs Examined, are often detected and expoſed, and ſometimes

ſometimes *Truth* forces its Way through their own Mouths; *Whereas* in Chancery, a contrary *Examen, or an aliud Examen* or Way of Tryal of Facts, hath been uſed and practiced, as the Foundation upon which that Juriſdiction ſubſiſts, *viz.* The Tryal hath been by *Depoſitions of Witneſſes*, examined in private, and taken down in writing, where neither of the contending Parties are permitted to be preſent, or to know what is ſworn by the Witneſſes, and after theſe *Depoſitions* are ſo written and publiſhed, the Lord Chancellor ſits as *Judge and Jury* to hear the Evidence read, and to determine whether thoſe Suggeſtions are *true* or *falſe*, and if his Lordſhip believes them to be *true*; then he is to order what he, in his *Diſcretion*, deems to be equal, juſt and good, ſo always that the common Law be not *Offended*; For if a Matter of *Fact*, upon which an Equitable Title to an Inheritance is grounded, be controverted, and variety of Proof is made thereof, *that Fact*, and the *Truth* of it, ought to be ſent to ſome Court, to be tryed by a *Jury* at common Law, before this Court of Equity can, or ought to make any Determination.

But in this Caſe, it is proper to obſerve, that whatſoever was the Ancient Buſineſs of the Maſter of the Rolls in the Court of Chancery, (which I do not pretend to Deſcribe) his Office was an Office of much greater Antiquity,

tiquity, than the firſt Inſtitution of the Court of Equity in Chancery, for we find that near 100 Years before the firſt Erection of that Juriſdiction, *viz.* in the Year 1288, the Great King *Edward* the firſt, upon the Peoples Outcries, cauſed and countenanced a ſtrict and ſevere Inquiſition to be made in Parliament, to find out, and hear Complaints, and puniſh indirect Practices and Offenders in the Adminiſtration of Juſtice, and that *Thomas Lithbury*, then Maſter of the Rolls, together with 10 of the 12 Judges, and other Officers and Miniſters of Juſtice, were accuſed in that Parliament, and convicted of *Corruption and Partiality*, and *Lithbury* the Maſter was fined 1000 Marks, * This general Depravity and Partiality in Matters of Juſtice, was in thoſe Times a lamentable Grievance; but in theſe happier Times, no Man can, or dares approach that Judicial Office with Temptations.

But in Proceſs of time many Grievances aroſe and daily increaſed, and the Cauſe or Fountain of thoſe Grievances was, by reaſon no Rules of Equity *ever were or can be* fixed or inſtituted to Bind the Judges of Equity; but every Judge of Equity hath in his own time made ſuch Decrees and Orders as ſeemed right and good in his own Mind; and if a Precedent hath been wanting, and it hath been objected, that the like had never been done,

* *Eyrrel* 56.

done, many of them have anſwered, they would make a Precedent, and therefore all that the Parliament could do or have done, hath been to fix and appoint ſtronger and plainer Bounds to compaſs in, the extraordinary Power of this Juriſdiction of the Chancery, as appears from theſe four Inſtances, *viz.*

I. The *firſt Inſtance* was, That in ſo ſhort a time as within 9 Years after this Court of Equity in Chancery had its firſt Inſtitution and Commencement, and was compleated by the Statute of the 17th, of *Richard* the 2d, *Anno Dom.* 1393, Complaints were made for double Vexations, and therefore an Act of Parliament was made in the 4th, Year of King *Henry* the 4th, cap. 23. *Anno Dom.* 1402, whereby thoſe new Grievances were Redreſſed, *viz.* It was Enacted that new Examinations in Chancery, of Matters of Fact, after the ſame had been tryed by Juries, or otherwiſe tryed by due Courſe of the common Law, ſhould not be attempted, but were prohibited: for the Verdict of a Jury, is by *Magna Charta* called a Judgment.

II. Another Grievance was, That People were vexed by Bills in Chancery, and by Writs of *Subpœna* purchaſed and ſued out thereupon, for Matters *Determinable at common Law*; and therefore the *ſecond Inſtance* was, That to Redreſs

Redreſs this Grievance the Statute of 15 *H.* 6. cap. 4. *Anno Dom.* 1435. was made, whereby it was Enacted, that no *Writ of Subpena* ſhould be granted, till Surety ſhould be found, to ſatisfy the Party Grieved, his Damages and Expences, if ſo be the Matter of the Bill be not made *Good*, that is, Equitable, and not determinable at common Law.

And yet after all theſe Steps made, for Inſtituting a Court of Equity in Chancery, and Directing its Proceſs and Proceedings, that celebrated Author Saint *Germin*, who, in the 23d, of *Henry* the 8th, *Anno Dom.* 1531. wrote the Learned Book called *Doctor and Student*, did as a *Traditional Writer*, without knowing the true Source, Aſſert, that Bills in Chancery, and the Writs of *Subpena and Injunctions* ſued out thereupon, did not ariſe from any ſpecial Grounds of Law, but were Proceedings *Indulged or ſuffered by the Common Law.*

And according to this Author, we find in Lord *Coke*'s 4th Inſtitute, page 86. That the two great Chief Juſtices *Popham* and *Anderſon*, and the Chief Baron *Periam*, and 6 other Judges in 43 *Eliz. Anno Dom.* 1601 were of Opinion, that the Court of Equity in Chancery, was founded on ancient Preſcription time out of mind uſed, or *ab Initio* of this Government; and that the great Lord Chief

Juſtice *Hobart*, in his Report of the Caſe between *Martin* and *Marſhal*, page 63, held with his ſaid Predeceſſors, the ſame Opinion, and therefore if I ſhould preſume to call theſe Opinions *Traditional*, I ſhould account my ſelf audacious, if I were not ſupported by the ſeveral Statutes before inſiſted on, *Againſt* which no Preſcription nor Opinions, altho' of the moſt Learned, ought to be heard or admitted: For no *Traditional* Law, or Opinion, or Judgment, can ſtand againſt poſitive Laws Enacted by Authority of Parliament; and further, it may be added, *Quod non legitur, non Creditur*, 4 Inſt. 304.

This Place therefore affords an Opportunity to ſhew, That the Reaſon of writing this *Reſearch* is, becauſe the learned Tracts that have been lately publiſhed on the Hiſtory of the Court of Chancery, have poſitively *Aſſerted*, and endeavoured to *Prove*, that the *Power* and *Authority* of that Court is *Abſolute* which, if believed, muſt neceſſarily miſguide thoſe who Preſide; for a Power that is *Abſolute* from all Laws, muſt be a Power to *Diſpence with Laws*, and therefore this *Reſearch* is written to ſhew, and to endeavour to *prove*, that there are certain Bounds fixed and inſtituted, by which the *Power* and *Authority* of that Court of Equity is compaſſed in, and over which it ought not to paſs.

But that Power did preſumptuouſly paſs, and wantonly Sport it ſelf, in the long Space of 15 Years, whilſt Cardinal *Wolſey* was Chancellor, as may be ſeen in Lord *Coke*'s 4*th*. Inſtitute page 89, and 92; For this Cardinal having for a long time enjoyed All the Power, Inſomuch that no Complaints could find Avenues to ſeparate him from the King: He, the Cardinal Chancellor, tho' he knew that the Orders he was about to make, were unlawful, yet he in his Preſumption made no Difficulty to Order and Decree the very Things, he knew were unlawful.

But ſtill notwithſtanding all the Proviſions before Enumerated, the *Power* of Courts of Equity broke thorow all their Bounds, and overflowed all their Banks, and Eſpecially in the Courts of Equity holden in the Marches of *Wales*, and in the *Northern* Parts, and in the Courts of the Dutchy of *Lancaſter*, and of the *Exchequer* of the County *Palatine* of *Cheſter*; *Great* Exceſſes were excerciſed, for the Judges of thoſe Courts, Diſpenſing with the Common Law, and Invading the Right of Property, and caſting the Statutes behind their Backs, laid about them, as if they had no Bounds or Limitations.

III. And therefore the *Third Inſtance* was That in order to explain all the Statutes afore-

ſaid, and to Reſtrain the Jurisdiction of thoſe Courts, and (as is ſuppoſed) the Juriſdiction of *all Courts of Equity*, and to repair the old, and fix new Bounds, It is by the Statute made in the 16th. of King *Charles* the 1ſt. cap, 10. Declared and Enacted, That the King's Majeſty (meaning his Miniſters, the Lord Chancellor, or any other Judge of Equity) hath not, nor ought to have, any Juriſdiction, Power, or *Authority* to Examine, draw into Queſtion, Determine, or diſpoſe of the Lands or Tenements, Goods or Chattles of any Subject by *Engliſh* Bill, or Petition, or by any other *Arbitrary* Way; But that all Queſtions touching the ſame, ſhall be Determined in the ordinary courſe of Juſtice, and by the ordinary courſe of Law, meaning according to *Magna Charta*) and that if any Lord Chancellor, or Lord Keeper, Biſhop, Temporal Lord, Judge or Juſtice whatſoever, ſhall offend, or do any thing contrary to the Purport, true Intent and Meaning of this Law, Then he or they ſhall, for ſuch Offence, Forfeit to the Party Grieved, the Sum of 500*l.* to be Recovered in any Court of Record at *Weſtminſter*.

This Statute hath therefore Reduced not only the four Courts before-named, but (as is apprehended) all other Courts of Equity to that Juriſdiction, which by the Statute of 37 *E.* 3. cap. 18. was at firſt Inſtituted, to which

which the *Memento* of *Magna Charta*, or the common Law, was, as Bounds thereto, fixed and annexed, *viz.* That the *Right of Tryals by Juries*, and by the due courſe of Law ſhall not be *Diſpenſed* with, or Denyed to any Man.

But it is objected to this Statute, That there is in the latter End of it, a Proviſo, which Enacts, that this Statute, and the ſeveral Clauſes in it ſhall extend only to the Court of Star-Chamber, and 5 other Courts named in that Proviſo: And therefore according to the Rule of *Exceptio format Regulam, in rebus non Exceptis.* So in the Caſe of a Reſtrictive Proviſo, this Proviſo, *format Regulam in Curijs non reſtrictis:* And conſequently this Statute affirms, that a *Diſpenſing Power* which is taken from the other Courts, remains in Chancery, Becauſe the Court of Chancery is not named in that Proviſo.

Anſwer. This negative Declaration made by the Legiſlature is general, *viz.* That the *King hath not*, nor ought to have, any Juriſdiction, to Queſtion or Determine the *Right or Property* of any Subject by the Method of Proceedings uſed in any Court of Equity: And therefore the Objection, That this negative Declaration, being to extend only to the 6 Courts mentioned in the Reſtrictive Proviſo, doth infer and imply the *Affirmative*, *viz.* That the King hath, by Vertue of the Proviſo.

ſo, a Juriſdiction given him in Chancery, to proceed in thoſe Methods contrary to *Magna Charta*, which muſt neceſſarily be a Conſtruction Repugnant and inconſiſtent with the very End and Purpoſe of the Statute itſelf, and in that reſpect the Proviſo muſt be, like meer Surpluſage, Void and of none Effect, becauſe it is *Deſtructive* to that whole Statute, in which it is incorporated, and would leave the Subject in a far worſe Condition than it found him, for altho' it redreſs Grievances in thoſe particular Courts, yet it would *Create* a new one in others, far more extenſive, and ſo work an Effect contrary to the Cauſe, and contrary to the full and expreſs Intention of the Makers.

This Anſwer may be Illuſtrated by this Inſtance, *viz.* The King hath not, by the Conſtitution, any Power to *Impoſe* Taxes on any of the Subjects of *England*, without a Grant thereof in Parliament; Now if the King, Lords and Commons, ſhould by an Act of Parliament Declare and Enact That the King *hath not*, nor ought to have, any *Power to Impoſe Taxes* on any of the Subjects of *England*, but the ſame ought to be *Impoſed* in the ordinary Courſe by Grants thereof, in Parliament, and ſhould by the ſame Act inflict Penalties on ſuch of the King' Officers as ſhould offend this Law; *Provided* that this Act and the ſeveral Clauſes therein contained, ſhall

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be expounded to *Extend only* to the four *Northern* Counties, would not an Inference. that the King hath by Vertue of the Proviſo, a Power given him to *Impoſe Taxes*, on any Subjects out of thoſe 4 Counties be a monſtrous Inference, and *Deſtructive* of ſuch an Act of Parliament.

And to theſe Arguments it may be added, that in the ſame Parliament of the 16th, of *Charles* I. cap. 14. when the *Diſpenſing Judgment* in the Caſe of the Ship Money, which had invaded the Right of Property, came to its Condemnation: The Parliament in order to admoniſh the Judges, both of Law and Equity, and to obviate and extirpate all *Diſpenſing Powers*, and all Pretences for them, inſerted this Clauſe, And *be it Enacted*, that the Statutes of this Realm ſhall be, by allthe Kings Officers and Miniſters firmly and ſtrictly holden and obſerv'd, which cannot be, if *Magna Charta* and its Explanations be *Diſpenſed* with; for when a Diſpenſer ſhall caſt the Maxims of Law, and the known Rules of Property, and the Statutes of the Kingdom behind his Back, and make his own Will ſtand for the Reaſon of his Judgment Then a Diſpenſing Power is plainly viſible, becauſe it can never be Equity to *Overthrow a Maxim of Law* when there is no Equitable Reaſon to warrant it. In ſuch a Caſe, the ſaying of *Philocles* the *Athenian* Captive, to the victo-

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rious, but cruel *Spartan Lyſander*, who Taunted and Inſulted him as he was going to the Place of Execution, is applicable *viz. Miſerable is the Man who hath no Judge to hear his Cauſe*, (*Plutarch* 376) and ſuch is the Man, whoſe Judge is (or acts as if he were) Abſolute; for the ſecret Will of ſuch a Judge is the Law which cannot be known till ſuch his Will be Pronounced.

But yet the unlimited Power of Determining *Matters of Truſt*, which the Chancery as a Court of Equity, appropriated to itſelf, as its own Creature, over which, it exerciſed an abſolute Power, to Qualify according to their Diſcretions, and Diſpoſe of it, in a different Manner, than of Eſtates at common Law, and ſo may, by its Power, take away from one Man, and give to another, what Truſts that Court pleaſed, being not reſtrained by any Laws, but ſuch only as that Court in its own Mind, deemed Juſt and Equitable: And for that Reaſon this Diſcretionary Power became a general Grievance.

IV. And therefore the *fourth Inſtance* was, That in Order to Redreſs this Grievance, by Introducing a Certainty in the Creation and Manifeſtation of *Truſts* of Lands, and of *the Perſons* claiming thoſe Truſts. The Legiſlature was pleaſed to make a Statute to prevent Frauds and Perjuries, 29 *Car.* 2. *Anno Dom.* 1677,

1677, and thereby to *Exact* in the ſtrongeſt Words both Affirmatively and Negatively, that could be at that time, or can be now Deviſed or Invented, *That all Declarations and Creations of Truſts of Lands, ſhall be manifeſted and proved by ſome Writing, ſigned by the Party who is, by Law, Enabled to Declare ſuch Truſt, or by his laſt Will in Writing, or elſe they,* (i. e. that all other Truſts, *not ſo manifeſted and proved*) *ſhall be utterly Void To all Intents and Purpoſes.*

This Statute, if the Words ſignify the Will and Meaning of the Legiſlature, hath reduced the *Power* of the Chancery, and hath taken away from that Court the Examination and Determination of *Truſts of Lands*, for the Statute hath *Enacted*, That if Queſtions ariſe about the *Perſons* claiming Truſts, and if an Iſſue be joined to Try this *Fact*, whether the *Perſon* claiming the Truſt be the *Perſon* or not; the Statute hath in this Caſe appointed the *Manner* of what *Proof* ſhall be allowed, and what Proof ſhall be Diſallowed, *viz.* Affirmatively, that the *Perſon* claiming the Truſt ſhall *prove* himſelf to be the Perſon by ſuch a *Writing*, as is *certain and manifeſt*, and as may be read in Evidence; and *Negatively*, that *conjectural* Evidence, either without *Writing*, or by a *Writing*, that is not certain and manifeſt, ſhall *not be Proof*, but ſhall be *Diſallowed*; and that this Fact ſhall be Tryed

by a Jury, for *ad Queſtionem facti non Reſpondent Judices*; and therefore the *Allowance* of *other Proof*, contrary to this Statute, muſt neceſſarily be that *hainous Offence* which this Law was made to prevent.

It is impoſſible but Grievances will ariſe, for *humanum eſt Errare*; but in Caſes where the Sovereign and Controuling Power of the Crown by the Chancellor, over the Subjects Liberty and Property, is made the Queſtion, Whether there is ſuch a Power or not, and if Judgments happen to be given, or Prohibitory Orders made, *contrary to Magna Charta*, and the Statutes aforeſaid; there the Grievance muſt be, of all others, the moſt provoking, becauſe ſuch Orders cannot be made, or Judgments given, without a Mixture of a *Diſpenſing Power*: For when a *Diſpenſing Power* is aſſumed to unmake the Law, or to depart from the Law, and to make the *Judge's Will* ſtand for the *Reaſon* of his Judgment, there is Room for *Partiality*, *viz.* To take an Eſtate from one Man, and give it to ſuch a Man, as can *acquire* moſt favour: And therefore when any ſuch Grievance ariſes from a *Diſpenſing Power*, it is ſuch a Vexation as *calls loudly* for Redreſs. Becauſe all Judges ought to give and declare the *Reaſons* of their Judgment, To the End the People may ſee and know whether the *Laws and Statutes*, which are to be ſtrictly holden and obſerved, or the

Will

Will of the Judge are to ſtand as the *Reaſons* for their Judgments.

But upon the *whole*, it is moſt evident and plain to all Men, That the Juriſdiction of a Court of Equity, in the Chancery, in the Manner it was at firſt Inſtituted, and to be Guided by the *Great Charter*, and by the ſaid Acts of Parliament, is, by the ſaid Acts of Parliament, ſet upon an equal Foot and Level (as to Matters within its Juriſdiction) with any other Court in *Weſtminſter-Hall:* And is a *Noble Eſtabliſhment*, and a *High and Honourable Juriſdiction*, and of moſt excellent Uſe and Benefit to all the People of this Nation, in all Caſes where the common Law hath not *provided Remedies* to recover Back, or to Defend real Rights; becauſe the Inclinations and Inventions of Mankind, to contrive Fraud and Injuſtice, and to ſubvert Right, and to evade the Juſtice of the common Law, or to make ſuch a Uſe of the Rigour of it, beyond all Reaſon and Conſcience, are increaſed, and become almoſt infinite: For in Multitudes of Caſes, it has been upon Examination found, that Men by Fraud and Deceit, or by Breach of Truſt and Confidence, and by other ill Practices, had got from weak People, and Poſſeſſed ſuch Titles in Law to Lands. and other Eſtates, and Intereſts, as never could, by the rigorous and ſtrict Rules of the common Law be defeated or avoided: And

yet upon ſuch Diſcoveries and Examinations as the Court of Chancery hath Enforced; It has been (as it is Expreſſed in the Statute of 17 *R.* 2.) *found and proved*, That ſuch Wrong Doers have not, in Juſtice and Conſcience, *any Right or Title at All* to the Lands and Eſtates they Poſſeſs: And therefore that Court hath juſtly Ordered, ſuch Wrong Doers to Part with and Reſtore and Reconvey back *ſuch Ill gotten Eſtates*, to the Right Owners; and conſequently *perpetual Injunctions* are, in thoſe Equitable Caſes, not only Proper, but Neceſſary.

And in this Place a proper Queſtion ariſes, touching the Power and *Authority* of this Court of Equity, as not being a Court of Record, *viz.* Whether the Ultimate Orders of this Court are *meerly Perſonal*, and Bind the Perſon only, and not the Eſtate and Intereſt, of the Party in the Lands or Goods in Queſtion.

To which Queſtion it may be anſwered, That in Caſes, where Men have no Right, but what was gotten by Fraud, or Breach of Truſt: There the Chancery may Decree, That thoſe that have in Conſcience the real Right, *ſhall Hold and Enjoy* the Lands, as well againſt Poſſeſſors by Fraud, as againſt Truſtees: For it is the *Ground* of Equity in both Caſes, that gives the Court a Juriſdiction and Power

Power to *Bind the Intereſt*, and to Defend the right Owners, in the Poſſeſſion of their Lands and Tenements, againſt ſuch Unconſcionable Offenders.

But as to ſuch Caſes as Depend on meer Queſtions of Law, without any *Mixture of Equity*, To make the Caſe of one Party better than the Caſe of the other, there the *Strictum Jus*, or the Strictneſs according to the Maxims and Eſtabliſhed Rules of the common Law, is the Right and Hereditary Privilege of every Man: And for that Reaſon, every Court of Equity is, by the Statutes aforeſaid, *Directed not to Interpoſe*, nor to Order *Perpetual Injunctions*, to take from any Man his Legal *Right and Property*; nor, which is the ſame Thing, to take from him, or to *Delay* his *Legal Remedy* to Recover that Right.

But if Courts of Equity ſhall Extend their Juriſdiction, and Exceed thoſe Bounds, in which the Statutes aforeſaid have Compaſſed in, their *Authority*, and ſhall Grant *Perpetual* Prohibitions or Injunctions, to Prohibit or Command the Parties, to *Deſiſt for ever*, from Proſecuting their *Remedies*, to Recover their Rights at common Law, *I leave it as a Problem*, Whether the Courts of common Law, may not by Force of *Magna Charta*, and the other Statutes of Explanation, Grant *Prohibi-*

tions,

tions, Commanding the Parties to *Deſiſt* from Proſecuting ſuch Suits in Equity, as are out of the Juriſdiction of Courts of Equity, and of which the *Cognizance* belongs to the King's Courts of common Law; and by that Legal Means to Reduce the Judicial Adminiſtration of Equity within the Statute Boundaries.

The Matter of this *Reſearch* is Doubtleſs *New and Difficult*, and different from the common Sentiments, The Writer therefore, being Senſible of his own Inability, Hopes and even Invites Thoſe who are more Learned, to Engage in the Attempt: For aſmuch as the Knowledge Treated of, concerns in Effect, every Man; For who can foreſee, but he, or his Children, or Friends, may become Suitors in Chancery: And therefore every good Man, that is able, ought to reach Aſſiſtance, To the End the *Defects* of this Reſearch may be Supplyed, and above all, That it may be Evinced, That *Judicandum eſt Legibus, non Edendum Leges*; and here, in Imitation of *Cicero*, I may ſay, *Habemus quidem Acta & Statuta, ſed in Tabulis Recondita, & tanquam Gladia in Vaginis Depoſita.*

IIdly, As to the Judicature of the Houſe of Lords, upon Appeals from Courts of Equity, and the Poſition, that That Juriſdiction, in the Dernier Reſort, is a Branch of their Original and Fundamental Judicature.

This

This Account may be given of that Matter, *viz.* That, that Queſtion of Judicature, came into Debate between the two Houſes of Lords and Commons in two Seſſions of Parliament, held in the Year 1675, in the Caſe of Doctor *Shirley* and Sir *John Fagg*, a Member of the Houſe of Commons, in whoſe Favour a Decree was made in Chancery againſt Doctor *Shirley*, concerning an Eſtate of 400 *l.* *per Ann.* from which Decree, *Shirley* Appealed to the Lords in Parliament: The Caſe, as it appeared in Chancery, was between two Purchaſers, *viz* *Shirley* Claimed the Lands in Queſtion, under a Settlement made by his Great Grandfather, in the 9th Year of King *James* the firſt, whereby the Lands were Settled upon the Great Grandfather for his Life, Remainder to the Grandfather for his Life, Remainder to the Plaintiff's Father, by Name, for his Life, Remainder to the firſt Son (which the Plaintiff *Shirley* then was) of the Father, and the Heirs Male of his Body: The Plaintiff's Father was but Tenant for Life, and yet he Sold theſe Intailed Lands to the Earl of *Thanet*, and the Earl of *Thanet* Sold them to Sir *John Fagg* for 6870 *l.* And in ſome time after the Purchaſe, Sir *John Fagg* was threatned to be Evicted by this old Settlement, which had been all along concealed; but Sir *John Fagg* hearing that the Settlement was in the Hands of one Mr. *Walter*, and being terrified

rified with Fear of the Loſs of his Purchaſe, he, Sir *John*, found Means (perhaps not very Juſtifiable) to get the Settlement into his Power, from, and out of the Hands of Mr. *Walter*.

Shirley, the Son, brought his Bill in Chancery againſt Sir *John Fagg*, in which he made Suggeſtions of this Matter, and the Relief he prayed was, to have a Diſcovery of the whole Matter, and to have the Deed of Settlement Delivered up to him, without which he could not prove his Title, or Proſecute his Remedy to Recover the Lands at common Law.

To which Bill Sir *John Fagg* pleaded in Bar to the Diſcovery; and to the Relief which *Shirley* prayed, That he was a fair Purchaſer of the Lands in Queſtion, and had paid a valuable Conſideration for them, without any Manner of Notice of the Settlement; for if he had had ſuch Notice, he had never Purchaſed.

The Lord Chancellor *Clarendon*, Aſſiſted by *Bridgman*, Lord Chief Juſtice of the Common Pleas, and Mr. Juſtice *Archer*, upon hearing the Cauſe, and the Merits of the Plea, were of Opinion, That Sir *John Fagg* being a fair Purchaſer, without Notice, and having gotten that Settlement into his Hands, which would, if he parted with it, utterly Defeat his

his Purchaſe: A Court of Equity had no Power to Diſarm him of that Advantage, (tho' poſſibly gotten by unfair Means) And therefore Ordered *Shirley*'s Bill to be Diſmiſſed, and to leave him to ſuch Remedy, as he could obtain at the common Law. And *Shirley* Appealed to the Lords in Parliament.

But the Houſe of Commons were ſo Angry at this Appeal, which Acknowledged the Juriſdiction of the Lords, to hear Appeals from Courts of Equity: That they committed not only Doctor *Shirley* for Appealing, but their own Member Sir *John Fagg*, for Submitting to that Appeal, upon which a famous Controverſy Enſued.

The Arguments of both Houſes, ſeem to be Grounded on general Declarations, and Reſolutions, without offering on either Side, any Evidence, that was Clear or Concluſive, or by which, either Houſe was, or was likely to be, by the other, Convinced.

The Lords Argued and Reſolved, That what the Commons had done in Commiting Doctor *Shirley* for Appealing, and his Councel for Arguing for him at the Lords Bar, was a Tranſcendent Invaſion of the Rights and Liberties of the Subject, and againſt *Magna Charta*, and other Laws, which had pro-

vided that no Man ſhould be Impriſoned, but by due Courſe of Law.

The Commons Argued, That they could not find, by *Magna Charta*, or by any other Laws, that the Houſe of Lords had any Juriſdiction, in Caſes of Appeals, from Courts of Equity.

The Lords Replyed and Argued, and Eſpecially the Argument of the Earl of *Shaftsbury*, in their Houſe, was formed in a Declamatory Manner, conſiſting of General and Poſitive Aſſertions, without Deſcending to the Bottom, or Producing any Evidence to Prove his Aſſumptions: Which however were extreamly Moving and Captivating.

But to theſe Arguments of the Lords, it might have been Added on their Side, That the Notion of the Commons did neceſſarily Suppoſe that the Lords, when They, in their Legiſlative Capacity, gave their Aſſent to the Statute of 37 *E.* 3. cap. 18, whereby it was Enacted, That the Grievances complained of ſhould be Redreſſed, by Removing the Suggeſtions made to the King himſelf, from before his Majeſty, and ſending them before the Chancellor, who, as Repreſenting the King ſhould Examine, Hear and Determine the Truth of them, and make ſuch Orders there upon

upon, as ſhould be Juſt and Equitable; ſaving always that thoſe Orders ſhould not Change or *Diſpenſe* with, or Offend, or Diſannul any Point of *Magna Charta*, or the common Law of the Land, or that the Lords, when They, in their Legiſlative Capacity, conſented to all the other Acts of Parliament, which were made to Compaſs in, and Guide the Chancellor in his Judgment and Adminiſtration.

I ſay that it muſt be extravagant to think, Either, that the Lords in ſo doing did, or did Intend, to ſet up a Judicature, whoſe Orders ſhould be final, without Appeal, and Exclude themſelves from Reviſing and Correcting thoſe Orders, or that the Commons when they Conſented to the Inſtitution of that new Juriſdiction, ever Intended any ſuch Excluſion; in Regard the Juſtice or Injuſtice of thoſe Orders, could never be Examined, or Meaſured, or Judged of, Whether the Appellant is, or is not Injured or Damnifyed, *contrary* to *Magna Charta*, and the common Law: Without conſidering the Nature and Extent of thoſe Orders, Appealed from, and Comparing them with the *Standard* called *Magna Charta*, and the Statutes of Explanation, to which the Lords had given their Legiſlative Aſſent, and then to Determine the Queſtion, Whether the Orders Complained of do, or do not Offend or *Diſpenſe* with, or Diſannul any Point of thoſe Statutes, or the common Law: which is the

proper Buſineſs of the Supreme Judicature, in the Dernier Reſort, For the Original Root of Judicature Veſted in the Lords, is to Examine and Correct the Errors of Judgments, in the King's Bench and other Courts of Law brought before them, by Writs Error: In which Caſe the Lords are Judges of Ju gments, in the Dernier Reſort, which is the Supreme Judicature that was always Uſed and Exerciſed, as their Fundamental Right and Privilege, and was never Queſtioned or Denyed.

And therefore if Arguments *a Majori* are forcible, that is, if the Maxim of Reaſon, that *Majus continet in ſe Minus*, that is, That the Greater contains the Leſs, be *True*; Then it may be Argued, That ſince the Lords are Judges of the higheſt Queſtions of Law, concerning meer Right and Property; They muſt be much more Judges of Collateral Equitable Circumſtances, that Attend that Right and Property, for *Equitas ſequitur Legem*: To which it may be Added, that *Juſtice* Depends on the *Truth* of Facts; The Tryal of which *Truth*, is the Inferior Buſineſs of a Jury: And therefore the Lords in their Judicial Capacity, when they Hear and Determine upon Appeals from Courts of Equity, do in ſome ſort Deſcend from their own Dignity: For as the Judges of Inferior Courts of Equity Act the Part of a Jury in Hearing the Evidence read, and Determining the *Truth*,

or *Untruth*, of the Suggeſtions: And after that, They Act the Superior Part of a Judge, in *Determining* what is Equity, and Natural Juſtice; Reſulting from thoſe *Facts*: So the Lords do Proceed in the ſame Manner, and Act in ſome Sort, the Part of a Jury, in hearing the Evidence read to Prove the Matter of Fact, contained in the Suggeſtions, on which the Right is to be Determined; and conſequently, if the foregoing Maxim of Reaſon be *True*, *viz.* That the Greater contains the Leſs, Then it muſt be Apparent, that what is here Stated, is ſtrong, and has ſufficiently Cleared and Proved; That the Judicature of the Lords in Parliament, upon Appeals from Courts of Equity, is *Included as a Leſſer Branch*, in their Fundamental Judicature upon Writs of Error: and that this Poſition, and the Evidences offered to Prove it, cannot be Overturned, or ſo much as Encountred, with any Others, of Equal Authority.

From which Premiſſes it is plain, That the Lords have *two Capacities*, the one Legiſlative, and the other, the Supreme Judicial, Capacity; and therefore this Qualification of their Judicial Capacity, is always to be Remembred, and kept in Mind, and hoped for: That the Lords will be pleaſed to Obſerve That their *Judicial Capacity*, in the Dernier Reſort, is compaſſed in, with the ſame Statute Boundaries, with which the Inferior Courts of Equity

Equity are *Bounded*; and that whenſoever thoſe Inferior Courts of Equity ſhall Exceed their Bounds, and ſhall make ſuch Orders, or Grant ſuch Injunctions or *Prohibitions*, as ſhall Change or Diſpenſe with any Point of *Magna Charta*, or the common Law, without any Ground of Equity to Warrant ſuch Orders: The Lords in Parliamen will (doubtleſs) Delight in Reforming thoſe Exceſſes, and Reduce them to that Law, which their Lordſhips, in their Legiſlative Capacity, have Ordered and Enacted to be ſtrictly Holden and Obſerved, and which, in common Juſtice, ought to be the Standard, and Rule of Property, and above all, It is Depended on, That whenever a Decree ſhall, in any Part, *Reſemble a Diſpenſing Power*, contrary to what the Lords have in their Legiſlative Capacity made a Law, and Rule of Juſtice, and Property; *Such* a Decree ſhall receive from their Lordſhips, all Manner of *Diſcountenance*.

FINIS.